Supreme Court, U.S.

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THERM-O-DISC, INC.,
Petitioner,

v.

MARYLAND CASUALTY COMPANY, as subrogee of EILEEN K. GITELSON AND SELMA INVESTMENT CORP. and EILEEN K. GITELSON,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals panel misunderstand and misapply this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and *General Electric Co. v. Joiner,* —— U.S. ——, 118 S.Ct. 512 (1997), when it held, in conflict with the decisions of other Circuit Courts of Appeals, that a trial judge faced with an objection to a proffer of scientific expert testimony can admit that testimony without applying *Daubert's* analytical framework to assess either the "fit" of the testimony or its reliability and without considering or making findings of fact regarding any of the factors this Court set forth in *Daubert*—despite the fact that the objecting party specifically relies upon one or more of these factors in urging that the testimony is not admissible, does not "fit" the case and is unreliable?

2. Did the court of appeals panel misunderstand and misapply this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and *Bourjaily v. United States,* 483 U.S. 171 (1987), when it held, in conflict with the decisions of other Circuit Courts of Appeals, that the burden for demonstrating the admissibility of expert testimony is a mere burden of "production" rather than the required burden of proof?

3. Did the court of appeals panel misunderstand and misapply this Court's decision in *General Electric Co. v. Joiner,* —— U.S. ——, 118 S.Ct. 512 (1997), when, in conflict with other Circuit Courts of Appeals, it used an abuse of discretion standard to determine whether the district court applied the analytical framework of *Daubert,* a question of law subject to *de novo* review?

4. Did the court of appeals panel misunderstand and misapply this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), when it held, in conflict with the decisions of other Circuit Courts of Appeals, that a trial judge faced with an objection to a

proffer of scientific expert testimony may admit the testimony without considering or making any findings of fact as to whether the bases of the testimony were facts and data not reasonably relied upon by similar experts and thus not admissible under Fed.R.Evid. 703?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Therm-O-Disc, Incorporated, through its counsel, The Kobayashi Law Firm, P.C., and Skadden, Arps, Slate, Meagher & Flom LLP, respectfully prays that a writ of certiorari issue to review the judgment and opinion of a panel of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 27, 1998, in order to resolve the conflicts between the Fourth Circuit and other circuits regarding interpretation of the Supreme Court decisions of *Daubert*

v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) ("*Daubert*"), *General Electric Co. v. Joiner,* —— U.S. ——, 118 S.Ct. 512 (1997) ("*Joiner*") and *Bourjaily v. United States,* 483 U.S. 171 (1987) ("*Bourjaily*") on issues of fundamental importance to the proper administration of justice in the lower federal courts presented herein.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit, filed on February 27, 1998, that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at pages 1a-12a ("Panel Opinion"). The final Order and Judgment of the United States District Court of Maryland is reprinted in Appendix B hereto ("App. B") at pages 13a-14a. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Panel on March 24, 1998 and its Order is reprinted in Appendix C hereto ("App. C") at pages 15a-16a. Select pages of the proceedings in what the district court characterized as a "*Daubert*-type" hearing are reprinted in Appendix D hereto ("App. D") beginning at page 17a.

JURISDICTION

On December 13, 1995, judgment on a subrogation claim was entered upon a jury verdict in favor of Respondent, Maryland Casualty Company, in the United States District Court for the District of Maryland. Petitioner timely appealed the judgment to the Fourth Circuit, which affirmed the district court judgment and denied Petitioner's timely-filed Motion for Rehearing and Suggestion for Rehearing *En Banc.* Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In this product liability subrogation case, Respondent proffered the opinion testimony of its expert witness, James Rodems, who proposed two novel theories in support of its contention that an alleged manufacturing defect in Petitioner's thermostat, contained in a Whirlpool clothes dryer, caused a fire in the subrogee's home.

A. The "*Daubert*-Type" Hearing.

By motion in limine, Petitioner challenged the admissibility of Mr. Rodems' opinion testimony. Immediately before commencement of trial, the district court held what it characterized as a "*Daubert*-type" hearing regarding the admissibility of this opinion testimony. App. D at 18a.

1. *The Misplaced Burden of Proof.*

At the hearing, the district court judge stated that *Daubert* applied to the circumstances of the case and that he understood his "gatekeeper" role regarding the admissibility of the proposed expert's testimony. App. D at 18a. However, the district court then invited Petitioner's counsel to proceed, and incorrectly stated, "you have the burden of proof." App. D at 18a. Respondent suggested that, to facilitate the proceedings, his witness go first. App. D at 18a-19a. Although the district court complied with the request, the change in order of presentation did not cure the district court's confusion regarding who had the burden of proof. At the end of the "*Daubert*-type" hearing, the district court erroneously ruled that Petitioner had failed to meet its burden, stating "the defendant has failed to establish . . . Mr. Rodems relied upon a scientific principle that was not valid." App. D at 39a-40a.

2. *Respondent's Expert's Speculative Testimony.*

Respondent's proffered expert, Mr. Rodems, is an engineer with degrees in electrical engineering. Although

Mr. Rodems testified that he had examined some 20 to 30 thermostats in his experience, there was no disclosure of whether those thermostats were in any way related or similar to the subject thermostat. App. D at 19a. He asserted that in "other examinations," he considered principles regarding "thermostats and the heat generated." App. D at 19a. These "examinations" and "principles" were not further identified.

Mr. Rodems advanced two entirely new, novel and wholly speculative theories in support of his claim of defect. His first theory was that the electrical contacts in the thermostat were somehow misaligned at some unidentified time to an undetermined extent and therefore caused excessive resistance heating at or near the point of alleged misalignment. This heat allegedly melted both the contacts and the phenolic insulation housing, allowing the thermostat to fall out of its holding bracket, creating an electric arc to the back panel of the dryer, and producing a shower of molten metal sparks that somehow caused the fire in the house (the "misaligned contacts theory").

The second theory was described as the "catastrophic plasma arc" theory, in which Mr. Rodems asserted that the alleged melting of the switch contact created a "catastrophic plasma arc" that caused an internal explosion of the thermostat, resulting in its disintegration and explosion out of the phenolic insulation housing in a shower of sparks, thereby grounding a portion of the switch assembly against the rear panel of the dryer, and somehow caused the fire.

Mr. Rodems had never previously testified in court regarding either theory. Indeed, by his own admission, his testimony was the first time he had ever heard of either of these theories being applied to a thermostat like the subject thermostat. App. D at 26a-27a. He did not and could not cite a single peer reviewed or published reference discussing or supporting his novel theories as applied to this thermostat. App. D at 20a-22a.

During the "*Daubert*-type" hearing, Mr. Rodems made a number of admissions demonstrating the lack of any proof of scientific validation or "good grounds" for his theories. For example, no scientific principle was identified or shown to be directly applicable to the thermostat at issue. App. D at 24a-26a. Mr. Rodems performed no tests to illustrate or substantiate either one of his theories. App. D at 22a-23a. In fact, only Petitioner subjected Mr. Rodems' contact misalignment theory to tests—tests that produced results entirely inconsistent with Mr. Rodems' hypothesis. App. D 28a-29a. Nor was there any evidence of any degree of acceptance of Mr. Rodems' theories in any scientific community. App. D at 29a-33a. In short, Rodems' explanation of how his theories applied to smaller switches,[1] like the Petitioner's thermostat, was based on unsupported beliefs and speculative conjecture hypothesizing what might happen if conditions that were never shown to have existed with respect to the subject thermostat were assumed to have occurred. App. D at 35a. Significantly, none of the witnesses who testified could identify a single instance in which a thermostat actually failed through the mechanism of either one of Mr. Rodems' theories. The trial judge admitted Mr. Rodems' testimony without consideration of, or making any findings of fact regarding, the "fit" or reliability of the proposed testimony or regarding the application of any of the relevant factors set forth in *Daubert* for determining "fit" and reliability.

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[1] Mr. Rodems admitted that the only time he had seen this theory, either applied or in the literature, was in switches such as circuit breakers, relays and power panels, that are much larger than and carry substantially higher currents than the thermostat at issue here and therefore bear no relation to this case. App. D at 23a-24a. Mr. Mason, Petitioner's expert, confirmed that Mr. Rodems' theory did not apply to small switches like the subject switch. App. D at 29a-30a.

B. The Fourth Circuit Panel Opinion.

The Panel Opinion, *per curiam,* affirmed the district court's admission of Mr. Rodems' "expert" testimony. App. A at 10a. Incorrectly interpreting and applying *Joiner,* the Panel Opinion held that the standard of review applicable to the manner in which the district court construed and applied *Daubert's* analytical framework is an abuse of discretion standard. App. A at 4a. In *Joiner,* however, this Court held only that the ultimate question of admissibility—i.e., whether the proffered evidence was properly admitted or excluded—should be reviewed under an abuse of discretion standard. The issue on this appeal is not the district court's decision to admit the evidence based upon its discretionary evaluation of the facts relevant to *Daubert's* analytical framework, but whether the district court in the first instance correctly followed the *Daubert* framework, a question of law subject to *de novo* review. App. A at 4a. Other Circuit Courts of Appeals properly have held that there is an initial *de novo* review of whether the *Daubert* framework was applied properly. Only after finding that *Daubert* was applied properly by the district court do these courts undertake an abuse of discretion review to determine whether the district court properly admitted or excluded the evidence.

The Panel Opinion then held that *Daubert* does not impose a burden of proof on the party proffering expert testimony, but rather only imposes a burden of production so that the trial judge may make a preliminary assessment of whether the proffered testimony is both reliable and helpful. App. A at 4a. The Panel Opinion misinterprets the holdings of this Court in *Bourjaily* and *Daubert,* and is in conflict with the decisions of several other Circuit Courts of Appeals. The Panel Opinion also erred when it found that the district court did not impermissibly shift the burden of proof to Petitioner to demonstrate that the expert testimony was not admissible. App A at 6a-7a.

Using its erroneous abuse of discretion standard of review, the Panel Opinion held that the district court did not err in failing to apply any of the *Daubert* factors to the proffered testimony to determine if the testimony was both reliable and helpful. Most significantly, the district court failed to consider whether Mr. Rodems' novel and speculative theories "fit" the facts of this case. The Panel Opinion states that application of the *Daubert* factors is not mandatory, but rather is discretionary. App. A at 8a. The Panel Opinion contradicts Fourth Circuit precedent in *United States v. Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995), *cert. denied*, 516 U.S. 1077 (1996), that found consideration of the factors to be directed by this Court, and conflicts with other Circuit Courts of Appeals that require consideration of the *Daubert* factors. App. A at 9a, fn. 29.

The Panel Opinion, in a single sentence, notes that the expert relied on authoritative manuals and treatises in reaching his opinions. App. A at 10a. However, the Panel Opinion does not consider the district court's failure to apply Rule 703 to the proffered opinion testimony as required by *Daubert*. The Panel Opinion disregarded the unequivocal statement of this Court in *Daubert*, which imposes an unconditional, preclusive requirement that expert opinions based on otherwise inadmissible hearsay be admitted "only if" the hearsay is comprised of the type of data and facts reasonably relied upon by experts in the particular field.

REASONS FOR GRANTING THE WRIT

Lower courts have been struggling to apply *Daubert's* analytical framework in a wide variety of settings. The thrust of this Court's decision in *Daubert* is the recognition that a trial judge must act as a true "gatekeeper" to assure that expert opinion testimony is reliable and relevant and "fits" before any such testimony is ruled

admissible for the jury's consideration. The basic function of the judge as gatekeeper is to decide whether and how expert testimony fits a case and whether it is sufficiently reliable to be admitted. As such, fact finding is critical to the gatekeeping function.

Indeed, the language of Fed.R.Evid. 104(a) requires a trial judge to function as a fact finder pursuant to *Daubert* when facts are contained within the context of an evidentiary dispute over admissibility. The instant case marks a radical and entirely unauthorized departure from the path other Circuit Courts of Appeals have taken because the Panel Opinion held that the trial judge need not apply the *Daubert* analytical framework to assess whether the methodology underlying an expert's opinion is reliable. Rather, the Panel Opinion held that the trial judge must only ensure that the proponent of the expert testimony has produced some evidence arguably relevant to the question of reliability. This is not gatekeeping. Instead, it represents acceptance of the argument made by the original *Daubert* petitioners that all that a trial judge must do is find some bases upon which a jury could accept evidence in order for that evidence to be admitted. In sum, the decision below raises a serious conflict among the circuits and promises to lower the bar to "junk science," as evidenced by the testimony actually admitted in this case, and to resurrect the argument of the *Daubert* petitioners that this Court explicitly rejected.

Moreover, while other circuits have recognized that the four factors this Court identified in *Daubert* are not exclusive or always relevant, no other circuit has held that *Daubert's* analytical framework has been satisfied when a trial court completely disregards an objecting party's evidence as to these and other relevant factors without any analysis whatsoever. If an objecting party provides evidence on these factors, Fed.R.Evid. 104(a) makes the trial judge a fact finder. Nothing in this Court's decision

in *Daubert* even suggests that a trial judge can arbitrarily ignore evidence of unreliability. Certainly, nothing in *Daubert* purports to excuse a trial judge from addressing one of these four factors when an objecting party explicitly relies upon it and offers evidence to support it.

Finally, in holding that the proponent of expert testimony does not have the burden of proving the admissibility of that evidence, but must merely meet a burden of production of evidence, the Panel Opinion ignores this Court's decisions in *Daubert* and *Bourjaily* and creates a direct split among the circuits on this issue. In sum, the Panel Opinion creates significant conflicts among the circuits (and within its own circuit). This Court should grant this writ to resolve these important conflicts.

I. THE PANEL OPINION'S HOLDING THAT *DAUBERT* DOES NOT REQUIRE THE CONSIDERATION OF ANY FACTORS WHEN EVALUATING RELIABILITY AND HELPFULNESS CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS.

The Panel Opinion erred in stating that a district court need not consider any of the factors this Court and other Circuit Courts have developed to assess the reliability and helpfulness, i.e., "fit" of scientific evidence. App. A at 7a-8a. The Panel Opinion contradicts the basic requirements set forth by this Court in *Daubert* and a majority of other Circuit Courts of Appeals, including, prior to this decision, the Fourth Circuit Court of Appeals itself. Thus, the Panel Opinion has created a conflict among the circuits in interpreting the decision in *Daubert* that should be addressed by this Court in order to avoid further confusion and misapplication of *Daubert*.

Daubert, of course, explicitly requires that, in evaluating scientific evidence, a trial court must establish (1) the reliability and (2) the helpfulness of such evidence,

prior to its admission. *Daubert*, 509 U.S. at 591-592. The factors set forth in *Daubert* to assist trial courts in the evaluation of the reliability and "fit" of scientific evidence, which have come to be generally known as "the *Daubert* factors," were intended to be non-exclusive and non-exhaustive. *Daubert*, 509 U.S. at 593-595. Contrary to the reasoning of the Fourth Circuit, however, *Daubert* does not stand for the proposition that a trial court may choose not to consider *any* of the factors in determining the reliability of scientific evidence. Rather, a trial court must apply those factors that are appropriate, i.e., relevant to the case before it, to determine whether there are "good grounds" for the proffered scientific expert opinion.

Since *Daubert* was decided, courts have looked to the *Daubert* factors as the foundation from which to begin an analysis of the reliability of purported scientific evidence. In *Daubert* on remand, the Ninth Circuit accepted the *Daubert* factors as a starting point, determined that some of the factors were not relevant to the case, and added an additional consideration—whether the proposed testimony grew out of independent research or was developed, as were Rodems' theories, solely for the purpose of testifying. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995).

Similarly, the Third Circuit, using the *Daubert* factors as a starting point, has added other factors to be separately evaluated. These additionally required factors include (1) the existence and maintenance of standards controlling a technique's operations; (2) the relation of the technique to methods which have been established to be reliable; (3) the qualifications of the expert witness testifying based on the methodology; and (4) the non-judicial uses to which the method has been put. *See In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 742, fn. 8.

Before issuing the Panel Opinion, the Fourth Circuit itself required consideration of the *Daubert* factors. *Powers*, 59 F.3d at 1471 (". . . the Supreme Court directed trial courts to consider, when evaluating the scientific validity of proposed evidence," the following four "factors"). In now holding that *no* criteria are required under *Daubert* for an evaluation of scientific reliability, the Fourth Circuit has ignored both its own precedent and the thoughtful decisions of other Circuit Courts of Appeals to the contrary.

Some of the Circuit Courts of Appeals have stated that not all of the factors are always applicable. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316-17 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995). Additionally, a court need not consider all of the factors. *See United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997). However, when *Daubert* has been held to apply to the evaluation of scientific testimony, as in the instant case, no Circuit Court of Appeals, until the Panel Opinion, has held that *none* of the *Daubert* factors need be considered. Indeed, the Sixth Circuit Court of Appeals has held that the trial court failed in its gatekeeper role in admitting the proffered testimony when it considered none of the *Daubert* factors. *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 67 (1997).

II. THE PANEL OPINION'S HOLDING THAT *DAUBERT* DOES NOT IMPOSE A BURDEN OF PROOF ON THE PROPONENT OF SCIENTIFIC EVIDENCE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In holding that the proponent of expert testimony does not have the burden of proving the admissibility of that evidence, the Panel Opinion creates a direct split among the Circuits on this issue. The Panel Opinion stated that *Daubert* only requires courts to perform a "preliminary

assessment" of the proffered expert testimony and, therefore, the proponent does not have to "prove anything to the court before the testimony in question can be admitted." [2] App. A at 4a-5a.

The majority of the other Circuit Courts of Appeals directly hold to the contrary. Indeed, this Court in *Daubert*, in footnote 10, directs that the admissibility of such evidence must be established by a "preponderance of proof" as required under Fed.R.Evid. 104. *Daubert*, 509 U.S. at 592 n.10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987)). *Bourjaily* states that the party proposing the admission of evidence must establish the admissibility by a preponderance of proof. *Bourjaily*, 483 U.S. at 175. This evidentiary standard is unrelated to the burden of proof on substantive issues. *Id.* "The preponderance standard ensures that, before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." *Id.*

The Panel Opinion failed to apply the plain meaning to the phrase "preponderance of proof" designated as the proper burden of proof by both *Daubert* and *Bourjaily*. In fact, the Panel Opinion erroneously found that Petitioner misused the term preponderance of proof to denote a burden of production, holding in footnote 9 that *Bourjaily* distinguished between preponderance of proof and a

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[2] Not only did the Panel Opinion incorrectly rule that the proponent of the evidence had only a burden of production of evidence on admissibility, it also incorrectly ruled that the district court did not err in shifting the burden, whether of proof or production, to Petitioner. The only basis disclosed by the trial court for admitting Rodems' testimony was, at the *end* of the *Daubert* hearing, that Petitioner failed to prove Rodems relied on a scientifically invalid principle. App. A at 7a. Despite the district court's ruling, the Panel Opinion erroneously concluded that the burden shifting mistake was corrected. App. A at 7a.

burden of proof. App. A at 4a-5a. To the contrary, this Court has continually distinguished a preponderance of proof burden from a burden of production. *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries,* 512 U.S. 267, 274-275 (1994). The case law that has evolved demonstrates that, although often blurred by careless speech, the two terms are distinct concepts. *Id.* This Court held in *Greenwich Collieries,* for example, that "a standard of proof, such as preponderance of the evidence, can apply only to a burden of persuasion, not to a burden of production." *Id.* at 278. It follows, therefore, that this Court's use of the phrase "preponderance of proof" in *Bourjaily* was intended to refer to a burden of proof. In short, the profferor of expert testimony unquestionably bears, as a matter of law, a "burden of proof" to persuade the court that the testimony is admissible.

The Panel Opinion's misunderstanding of the burden of proof with respect to admissibility is further demonstrated by its quotation and citation of *In re Paoli:* "plaintiffs do not 'have to prove their case twice—they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct,* they only have to demonstrate by a preponderance of the evidence that their opinons are reliable.' " App. A at 6a, citing *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 744 (3d Cir. 1994), *cert denied,* 513 U.S. 1190 (1995) (emphasis in original). The quoted language of *Paoli* requires a proponent of expert testimony to meet more than a mere burden of production. *Id.* The holding of the Panel Opinion eliminates the requirement that the district court address the "technical issues and policy concerns" raised by the Federal Rules of Evidence. *Id.*

The Panel Opinion directly conflicts with the majority of the other Circuit Courts of Appeals opinions on the issue. For example, the Ninth Circuit squarely has held

that the proponent of the expert testimony bears the burden of proving its admissibility. *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The Sixth Circuit has affirmed a district court decision excluding expert testimony because the plaintiff failed to persuade the court that the testing was reliable and supported by the raw data. *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 139 (6th Cir. 1995). The Tenth Circuit has stated that the standard articulated by this Court in *Daubert* is simply a restatement of Rule 702, and, as such, courts are bound to determine that the requirements of the rules of evidence, in general, are met by a preponderance of proof. *Summers v. Missouri Pacific R.R. Sys.*, 132 F.3d 599, 603 n.3 (10th Cir. 1997). These courts recognize that the party offering the expert testimony must lay a foundation for its admission. *See e.g., United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 750 (1997).

Permitting the Panel Opinon's interpretation of *Daubert* to stand would undermine the technical issues addressed by the Federal Rules of Evidence, as discussed by this Court in *Bourjaily*, and the policy concerns and implications of this Court's holding in *Daubert*. *Daubert* relies on trial courts to act as gatekeepers and exclude evidence that is unsupported and speculative. Were the question of admissibility to turn merely on the burden of production, courts would be forced to admit evidence that under the appropriate preponderance burden of proof standard would be excluded as having too great an analytical gap to be reliable or helpful. *Joiner*, 118 S.Ct. at 519. For example, the Panel Opinion's lower standard of mere "burden of production" for establishing evidentiary foundation requirements for admissibility would seem to allow the admission of expert opinion testimony based on animal studies without requiring the proponent to persuade the court that the expert properly extrapolated the data and that such data would be, and was, appropriately

applied to humans as a method of proving the cause of certain diseases. This type of opinion testimony has repeatedly been excluded by courts properly applying *Daubert*. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995); *Raynor v. Merrell Pharmaceuticals, Inc.*, 104 F.3d 1371 (D.C. Cir. 1997).

Unlike the Fourth Circuit, the majority of the Circuit Courts of Appeals have correctly interpreted *Daubert* and *Bourjaily*. Petitioner respectfully requests this Court issue the requested writ in order to clarify and reinforce the correct burden to apply to the admissibility of expert testimony pursuant to *Daubert*.

III. THE STANDARD OF REVIEW APPLIED BY THE PANEL TO DETERMINE WHETHER *DAUBERT*'S ANALYTICAL FRAMEWORK WAS PROPERLY APPLIED IS ERRONEOUS AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Panel Opinion misinterprets and misapplies this Court's holding in *Joiner* by applying an abuse of discretion standard of review rather than a *de novo* standard of review to the issue of whether the analytical framework of *Daubert* was properly applied as a matter of law. Questions of law are to be reviewed *de novo*. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).[3]

In its appeal, Petitioner not only asserted that the admission of the expert testimony was an abuse of discretion, but also, and more importantly, asserted that the district court failed to properly apply the framework of *Daubert* as a matter of law. The Sixth, Seventh, Ninth

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[3] The Panel Opinion, by applying an abuse of discretion standard, directly contradicts Fourth Circuit precedent holding that a *de novo* standard of review is applicable to questions of law. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995).

and Tenth Circuits all have addressed this issue and have held that the proper application of *Daubert* is a question of law for the court to review *de novo*. Only then, once *Daubert's* relevance and proper application have been determined *de novo*, is the court of appeals powered to reverse the exclusion or admission of evidence governed by an abuse of discretion standard. *Cummins v. Lyle Indus.*, 93 F.3d 362, 367 (7th Cir. 1996) ("We first undertake a *de novo* review of whether the district court properly followed the analytical framework established in *Daubert*."); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 805 (9th Cir. 1997); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1517 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 611 (1996). The court of appeals must undertake a *de novo* review of whether the district court properly applied *Daubert's* framework and its factors. *See Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 302-303 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 67 (1997).

The Seventh Circuit has addressed this issue subsequent to this Court's decision in *Joiner* and continues to apply a *de novo* standard when reviewing the initial application of *Daubert*. In its post-*Joiner* decision, *United States v. Vitek Supply Corp.*, —— F.3d ——, 1998 WL 242446 (7th Cir. 1998), the Seventh Circuit applied a two-tier standard of review to an appeal involving *Daubert* issues. The Seventh Circuit first applied a *de novo* review to ensure that the district court followed the *Daubert* framework. *Id.* After determining the court's analysis was within the parameters of *Daubert*, the court applied an abuse of discretion standard to review the actual admission or exclusion of evidence. *Id.*

The Panel Opinion ignores the *de novo* standard of review and applies an abuse of discretion standard, citing *Joiner*. However, this Court's decision in *Joiner* did not alter the application of a *de novo* standard of review for

initially determining whether the framework of *Daubert* was applied properly as a matter of law. *Joiner* only dealt with the applicable standard of review of the district court's decision to admit or exclude the scientific evidence after proper application of *Daubert*. Therefore, *de novo* review remains the proper standard for reviewing whether *Daubert* was properly applied as a matter of law, while abuse of discretion is the proper standard for reviewing the resulting admission or exclusion of evidence. The Fourth Circuit neither acknowledged nor applied the *de novo* standard of review and, therefore, the Panel Opinion is in conflict with the law of the Sixth, Seventh, Ninth and Tenth Circuits.

IV. THE COURT OF APPEALS ERRED IN DISREGARDING THE DISTRICT COURT'S FAILURE TO APPLY FEDERAL RULE OF EVIDENCE 703 IN DETERMINING THE RELIABILITY OF THE EXPERT TESTIMONY AS DIRECTED BY *DAUBERT*.

The Panel Opinion does not substantively address Petitioner's appellate challenge to the district court's failure to apply Fed.R.Evid. 703. In so doing, the Fourth Circuit contravenes the directions of this Court in *Daubert* instructing trial courts to be specifically "mindful" of Rule 703, which imposes an unconditional, preclusive requirement that expert opinions based on otherwise inadmissible hearsay are to be admitted "only if" the facts or data relied upon by the expert are of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. *Daubert*, 509 U.S. at 595. The question of whether facts, data or opinions relied upon are of a type reasonably relied upon by experts in the field is a preliminary one for the court. *Moore v. Ashland Chem., Inc.*, 126 F.3d 679, 693 (5th Cir. 1997). The Panel Opinion, in failing even to address Petitioner's Rule 703 challenge, conflicts with this Court's clear instruction in *Daubert* and the opinions of several Circuit Courts of Appeals.

The resulting prejudice to Petitioner is highlighted by the Panel Opinion itself, which held that the district court's admission of plaintiff's expert testimony was not an abuse of discretion because "Rodems was able to cite numerous works of technical literature that he *alleged* supported his mode of analysis." App. A at 10a (emphasis added). As other Circuit Courts of Appeals have recognized, *Daubert's* "only if" language requires more than mere allegations of reliability by the proffered expert. These Courts of Appeals have held as a matter of law that an expert's own bald assurances of validity are not enough to satisfy Rule 703. *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997); *United States v. Pierre*, 47 F.3d 241, 243 (7th Cir. 1995); *Daubert*, 43 F.3d at 1316. *See also Joiner*, 118 S. Ct. at 519 ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.")

As the record below makes clear, these references to technical literature and Rodems' allegations that the literature supported his mode of analysis were the only bases available to support the proffered expert testimony. Those references were, as a matter of law, wholly inadmissible hearsay to which *Daubert* instructs the trial court to apply Rule 703. The Panel Opinion failed to address the district court's failure to require Respondent to establish the foundations for the hearsay that are preconditions to admissibility under Rule 703. The Panel Opinion below further erred by holding that the admission of this testimony, which did not meet Rule 703, was not an abuse of discretion.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted and a writ of certiorari should be issued.

Respectfully submitted,

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